IN THE SUPREME COURT OF FLORIDA

CASE NO: 72,671

MATTER OF INTEREST ON TRUST)
ACCOUNTS: A PETITION TO AMEND)
THE RULES REGULATING THE)
FLORIDA BAR)

COMMENTS OF BEN L. BRYAN, JR.

The undersigned submits the following comments and argument concerning the Petition filed by The Florida Bar Foundation to make participation in the IOTA program mandatory.

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Preliminary Comments

I represented the 19th Circuit on The Florida Bar Board of Governors for six years, beginning in 1980. When the IOTA program was implemented on a voluntary basis, I joined the program and wrote every lawyer in the Circuit urging participation in the program. On numerous occasions, I appeared before the Bar Associations of Indian River, Martin, St. Lucie and Okeechobee Counties urging voluntary participation in the IOTA program. When the program was challenged in the lawsuit against Holland and Knight, I withdrew from the program and ceased urging participation until that question could be settled. The Nineteenth Circuit is composed primarily of small firms and it did not seem reasonable to expose them to the potential of the lawsuit. When that lawsuit was resolved, the law firm of which I am currently a member joined the IOTA program on a voluntary basis. These personal comments are submitted so that this Court, as the ultimate policy-making body for The Florida Bar, will know that the undersigned supports IOTA on a voluntary basis.

Objections

I object to the effort to make the program mandatory for all Florida lawyers with trust accounts. Styling the modification as "comprehensive" makes it no less mandatory than the same stylistic approach used for mandating Continuing Legal Education. The verbiage is an effort to defuse the negative reaction that results from using the word "mandatory".

Lawyers historically have reacted adversely to attempts to "mandate" standards of behavior upon them unrelated to the practice of law. Fortunately for this country, lawyers from the days of the Revolution have been willing to resist efforts to impose unreasonable restraints, restrictions or taxes upon them and their fellow citizens. While imposition of mandatory IOTA does not approach the seriousness of those causes which resulted in the Revolution, the reaction of many is similar.

The Bar Foundation attempts to justify the assessment by its flattering the Court's efforts in the past to "promote the full availability of legal services". It assumes the conclusion in the last sentence of paragraph 17 that this is the next logical step. (Why is any step required?) It further states in paragraph 18 that the funds which generate IOTA income do not belong to the attorney. This is true; but then it assumes that somehow the interest on those funds belongs to The Florida Bar Foundation, or the Court, or some entity having no direct involvement in the business transaction generating the funds. It then assumes that public policy dictates that idle funds be put to work in the public interest. If this is true, then Point II of the Comments of Richard V. Neill (which are incorporated by reference herein) would certainly seem valid as to the entity empowered to claim the interest on the idle funds. Further, this argument would apply to escrow accounts held by title companies, real estate agencies, accountants, and any others holding escrow funds. Pushed to its extreme, the comment would apply to <u>any</u> funds held by banks in non-interest bearing accounts.

These comments are not directed to the law applicable to the program, as likely this Court will determine that the law is that it can establish whatever program it deems appropriate. However, the comments are an effort to persuade the Court that the program should remain a voluntary program. Those attorneys who choose to participate should do so, while those who do not should not be required to do so on behalf of themselves and their clients.

If lawyers have, in addition to pro bono work, further obligation, then Mr. Neill's suggestion as to an individual assessment would more nearly fulfill that obligation. This is not a suggestion that would meet with favor from most members of The Bar and, if that were the choice, most would probably opt for mandatory IOTA. However, that avoids the question as mandatory IOTA is not the legal profession filling that obligation, but rather clients or banks and their customers meeting the obligation asserted to be that of the legal profession.

The current voluntary program is a reasonable compromise between all of the competing needs and principles. The current program provides a substantial amount of money. With a renewed effort to increase participation, more should be generated now that the Holland and Knight suit is resolved. Lawyers would still have an ability to segregate their trust accounts and, if they have clients who object to the uses for which the funds are put, utilize non-interest bearing accounts for those clients. The banks seem supportive because the effort is not costing them more than they are prepared to absorb. The Legislature has shown no interest in that the participation is voluntary and, therefore, not seen as a tax. The Petition by The Florida Bar Foundation should be denied and The Florida Bar Foundation encouraged to proceed with the existing program.

Comments Re: Alternative Implementation

If the Court changes the voluntary IOTA program, then I respectfully urge the Court not go beyond the "opt-out" program described in the Petition.

The undersigned is not certain as to how persons become members of The Florida Bar Foundation, but can tell by looking at the names that nearly all come from urban area silk-stocking law firms with a philosophical tilt toward the belief that all the problems of the State can and should be solved by The Florida Bar. If membership in The Florida Bar were optional, I would have no quarrel with this approach, as non-subscribers to the belief could withdraw. That option is not available and the

proposal would then place in the hands of those Directors (all of whom are individually fine and personable people) a humongous amount of money to be disbursed on whatever they deem appropriate. What expenditure could not be asserted to benefit "administration of justice" programs or in some way help the poor obtain access to the courts?

The method of representation does not matter on a voluntary program as, so long as the Foundation knows that if it does something that affronts a substantial number of its participants that those participants could withdraw, the Foundation's actions will be tempered. Being able to withdraw is the best assurance that participants have that the funds will be utilized in a responsible fashion. This safeguard will have much more impact than any method of electing Directors. Any effort to protest through that process would require first, that persons objecting to the social aims or whims of the Foundation be willing to run and, secondly, that they be elected. It is difficult for representatives from smaller law firms in non-urban areas to serve on the Board of Governors, which makes some effort to accommodate that difficulty. It would be virtually impossible for these persons to aspire to the governing Board of The Florida Bar Foundation.

Conclusion

For the above set out reasons, the undersigned respectfully urges the Court to decline to impose mandatory IOTA on practicing members of The Florida Bar. The statistics establish that a substantial majority of attorneys do not wish to participate and, in fact, numbers vigorously object for various reasons. There are others, such as myself, who participate on a voluntary basis but, if mandated to do so, will make every effort to minimize the income received by The Bar Foundation from trust accounts. Alternatives currently available would be to utilize title companies or real estate companies for funds now kept in trust accounts.

If the Court sees fit to grant the Foundation's Petition to tax the banks and their depositors, then the "next logical step" ought be to at least try the "opt-out" program to determine its viability. That would retain some of the checks and balances on expenditure of funds currently existing under the voluntary program.

Respectfully submitted,

BEN L. BRYAN, JR. of
FEE, BRYAN & KOBLEGARD, P.A.
P. O. Box 1000
Ft. Pierce, FL 34954
(407) 461-5020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been served upon WILLIAM O. E. HENRY, ESQ., The Florida Bar Foundation, 880 N. Orange Ave., Suite 102, Orlando, FL 32801; RODERICK N. PETREY, ESQ., The Florida Bar Foundation, 3400 One Biscayne Tower, 2 S. Biscayne Blvd., Miami, FL 33131; JACK HARKNESS, JR., ESQ., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300; and RICHARD V. NEILL, ESQ., Neill Griffin Jeffries & Lloyd Chartered, P. O. Box 1270, Ft. Pierce, FL 34954, by mail this 6th day of September, 1988.

Ben L. Bryan, Jr.